

Karin M. Gunter, Esquire
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ATTORNEY FOR PLAINTIFF,
MARTHA STEELE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARTHA STEELE,
Plaintiff

v.

HCI DIRECT,

Defendant.

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Civil Action No. 02-cv-4347

**PLAINTIFF'S RESPONSE IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS**

Plaintiff, Martha Steele, by and through her undersigned counsel, Karin M. Gunter, Esquire, respectfully request this Honorable Court DENY Defendant's Motion to Dismiss on the following good cause grounds:

1. Plaintiff was *pro se in forma pauperis* at all times before and within the 120 days after filing the original complaint on July 19, 2002.
2. Plaintiff remained *pro se in forma pauperis* for all times during this litigation until January 29, 2003 when she and the undersigned counsel entered into an attorney client

relationship.

3. A summons was issued on July 19, 2002 directed to Defendant and forwarded to the U.S. Marshal's office for service of process.

4. The U.S. Marshal's office failed to file an unexecuted waiver of service or an affidavit/proof of service of the original complaint and summons.

5. Plaintiff justifiably relied on the U.S. Marshals Service for service of process.

6. This Honorable Court granted, within 120 days of filing the original complaint, Plaintiff leave to file an amended complaint.

7. Plaintiff attempted to stay the proceedings within 120 days of filing the original complaint.¹

8. Plaintiff never received notice from this Court that service had not been made and/or that the action would be dismissed for failure to timely serve process.

9. Defendant had actual notice of the instant lawsuit as early as January 22, 2003 based upon Plaintiff's *pro se* filing a proof of claim in Defendant's bankruptcy proceedings.²

10. On or about March 28, 2003, Defendant agreed to resolve Plaintiff's claim in federal district court and to pay any amount determined due and owing as a result of the district court action.

¹ Plaintiff filed a motion to call time out on August 15, 2002 (Docket No. 6). In its January 27, 2003 order (Docket No. 13) denying Plaintiff's motion as moot, this Court has interpreted Plaintiff's request as a motion to stay the proceedings.

² Executive Vice President and Chief Financial Officer, William C. Beisswanger, acknowledged awareness of Plaintiff's federal litigation in his February 21, 2003 federal bankruptcy declaration.

11. Defendant is not prejudiced by Plaintiff's failure to serve original complaint within 120 days of its filing due to Defendant's extensive involvement and document production in the administrative agency investigation.³

12. Alternatively, counsel for Plaintiff exercised due diligence when she contacted the Court for procedural guidance with the instant case due to the numerous *pro se* motions filed.

13. Alternatively, counsel for Plaintiff's failure to file a motion for enlargement of time to serve pursuant to Fed. R. Civ. P. 6(b) and after the expiration of more than 200 days of filing the original complaint is excusable neglect.

14. Alternatively, Plaintiff's amended complaint relates back to the original pleading via Fed. R. Civ. P. 15(c) since: (i) leave to file the amended complaint was granted within the 120 day filing period for the original complaint, (ii) Plaintiff was not required by this Court to make an additional motion for leave of court to file her amended complaint; (iii) Defendant had notice of the original complaint prior to filing the amended complaint; and (iv) service of process of the amended complaint was properly made.

At all times during this litigation, Plaintiff acted in good faith and has good cause for an extension of time to serve the original complaint. Defendant had notice of Plaintiff's claims in the instant action and has not been prejudiced by plaintiff's failure to timely serve the original

³ Plaintiff filed a complaint with the Equal Employment Opportunity Commission (EEOC) on or about August 21, 2001. In her agency complaint, Plaintiff alleged, *inter alia*, disability discrimination and harassment other than sexual. Defendant was represented by Jacqueline Z. Shulman, Esquire of Obermayer Rebmann Maxwell & Hippel, LLP during the EEOC administrative agency investigation (Philadelphia District Office). Defendant by above named counsel submitted an Answer; Response to Document Request; and Position Statement on October 15, 2001. These documents along with exhibits A – N totaled nearly 300 pages.

complaint. Plaintiff respectfully moves this Honorable Court to deny Defendant's motion to dismiss, grant Plaintiff an extension for serving the complaint as amended and direct Defendant to file an Answer to Plaintiff's Amended Complaint within twenty (20) days of the entry of this Court's order.

The reasons for this Response are set forth in the attached Memorandum of Law, which is herein incorporated.

Respectfully submitted,

KARIN M. GUNTER ATTORNEY AT LAW

/s/ Karin M. Gunter, Esq. _____
Karin M. Gunter, Esquire
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7323 N. 21st Street
Philadelphia, PA 19138-2107
(215) 548-9992

Date: September 23, 2003

CERTIFICATION OF SERVICE

I do hereby certify that service of a true and correct copy of the within Plaintiff's Response in Opposition to Defendant's Motion to Dismiss was made on the 23rd day of September, 2003 to below named counsel for Defendant via first class U.S. mail, postage pre-paid:

Joseph J. Centeno, Esquire
Obermayer Rebmann Maxwell & Hippell LLP
1617 John F. Kennedy Boulevard
One Penn Center, 19th Floor
Philadelphia, Pennsylvania 19103-1895

/s/ Karin M. Gunter, Esq. _____
KARIN M. GUNTER, ESQUIRE

Date: September 23, 2003

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ORDER

AND NOW, this day of , 2003, upon consideration of Defendant's Motion to Dismiss and Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, it is hereby ORDERED that Defendant's Motion is DENIED. It is furthered ORDERED AND DECREED that Defendant HCI Direct serve an Answer to the Amended Complaint within 20 days of entry of this Order.

BY THE COURT:

BRUCE W. KAUFFMAN, J.